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COMPETITION ALERT

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IN THIS ISSUE

GM SEEDS: COMMISSION TO TAKE CAC DECISION TO THE SUPREME COURT OF APPEAL

The Competition Commission has filed an application to appeal the Competition Appeal Court's (CAC) decision to approve the merger between Pioneer Hi-Bred and local firm, Pannar Seeds.

The CAC overturned the Commission and the Competition Tribunal's prohibition of the merger on the basis that Pannar Seeds, while not failing, is in decline and will ultimately exit the market if it does not partner with another firm. The CAC approved the merger, despite the market being reduced to two players, on the basis that the merged entities will be able to compete more effectively together than either could have competed on their own.

The matter turns on the application of the so-called 'failing firm' defence to ostensibly anti-competitive mergers. Where it can be shown that a target firm would exit the market absent the merger; that its market share will largely accrue to the acquiring firm; and that there were no other purchasers that would give rise to less competitive concern, then the merger may be approved on the basis that the loss of competition is largely inevitable in the short term. The tenets of the failing firm doctrine intersect with the more general question in merger control as to whether an 'effective competitor' is removed. While a 'distressed' firm can rely on the notion that it is not likely to remain an effective competitor as a factor to be considered, a truly 'failing' firm can rely on the failing firm defence as something of a silver bullet.

The Commission's appeal is likely to explore the doctrine in detail. The application is reported to be premised on the basis that the CAC erred in two fundamental respects: firstly, that the failing firm defence could not be relied on as Pannar Seeds is a declining rather than failing firm and secondly that the CAC misapplied the principles of the failing firm defence in reaching its decision. According to Competition Commissioner, Shan Ramburuth, the CAC reversed the onus of proof by requiring the Commission to prove that Pannar Seeds would have subsisted but for the merger. The failing firm doctrine requires that the merging parties prove that the alleged failing firm would exit the market in the absence of the merger.

Notably, the CAC also awarded costs to the merging parties for fees incurred during the Tribunal and CAC's review of the merger. In such proceedings, legal costs are likely to run into millions of Rands. It is expected that the Commission's appeal will also challenge the CAC's award for costs. According to the Commission, such an award is an abuse of its investigatory powers and the Commission should not be kept from fulfilling its investigatory duties for fear of paying legal costs.

CONCOURT 'RAIN DELAY' IN OMNIA AND LOUNGEFOAM MATTERS

The Competition Commission has been denied leave to appeal directly to the Constitutional Court (ConCourt) in matters concerning both Omnia/Yara and Loungefoam.

In the ordinary course, appeal from the CAC lies to the Supreme Court of Appeal (SCA), and from there to the ConCourt. In certain cases, one can leapfrog the SCA and go straight to the ConCourt. However, this must either be with the leave of the CAC or in the interests of justice. In these cases, the Commission sought direct access to the ConCourt and did not seek leave to appeal from the CAC to the SCA (presumably, the Commission did not think the SCA would rule in its favour given the court's decision in the Woodlands Dairy case, on which the CAC largely based its reasoning).

The ConCourt appears to have dismissed the cases based on procedural issues. What is curious is that the ConCourt decisions suggest that it was not in the interests of justice to allow the appeal. At a constitutional court level, direct access can be allowed where the issue relates to constitutional matters and where the 'interests of justice' require the matter to be decided directly. The test for whether an appeal is in the interests of justice typically includes whether there are prospects of winning the appeal – presumably the reason the ConCourt took six months to dismiss the cases is because there was much debate among judges as to whether the Commission has a prospect of success on the merits.

It is tempting to conclude that the fact that leave to appeal was dismissed means that the judges felt the case was not that strong. However, this does not emerge from the written judgments, where there are statements suggesting that the prospects of success may have been good.

In the majority judgment in the Loungefoam case, Justice Maya writes that "accepting that the matter raises issues of public importance and assuming that there may well be good prospects of success in the appeal, these factors are nonetheless not decisive". The minority judgment goes even further, stating that "there are prospects of success in the appeal".

It seems that the ConCourt has refused to hear the case based on strict procedural grounds, while tantalisingly suggesting that the Commission may be justified in appealing. There have been a slew of direct access applications to the ConCourt recently, and perhaps the Court has decided to send a message to the effect that it really should be a final stage of a legal process and that the jurisdiction of the SCA should not be side-stepped as a matter of course. However, there may be just enough in the judgments to send a signal to the SCA (and the CAC in determining leave to appeal) that it should consider reversing the CAC decision, as a further appeal to the ConCourt may well succeed.

TRIBUNAL REVERSES RECENT MERGER PROHIBITIONS BY THE COMMISSION

When the Commission prohibits an intermediate merger, there is an automatic right to have the Tribunal reconsider the decision.

So too, when the Commission recommends that a large merger be prohibited, the Tribunal ultimately decides. Recently, a number of Tribunal decisions have reversed the Commission's findings.

During July, the merger between Thaba Chueu Mining and SamQuarz, the silica producing subsidiary of Petmin, was conditionally approved by the Tribunal. The Tribunal's approval is the result of the reconsideration application brought by the merging parties following the Commission's outright prohibition of the merger earlier in the year.

The Commission was concerned about foreclosure effects, and believed the merger would enable Thaba Chueu Mining, a subsidiary of Silicon Smelters which operates ferrosilicon and silicon metal producing plants in Polokwane and Witbank, to control a critical input to its downstream competitors in the markets for ferrosilicon, silicon metal and silicon carbide. The Commission was also concerned that the merger would alter the structure of the market and increase the likelihood for co-ordination in the market for ferrosilicon.

To address concerns around foreclosure, the merging parties concluded long-term supply agreements with two customers that had originally raised concerns to the Commission. The long-term supply agreements led to both customers withdrawing their intervention applications. Despite the withdrawals, the Commission refused the merging parties' requests for the Commission to reconsider its decision and continued to oppose the merger on the basis that the supply agreements did not go "far enough" in addressing its concerns.

The Tribunal found that the supply agreements sufficiently addressed the foreclosure concerns and approved the merger subject to the conditions that the merging parties honour the terms of the supply agreements and provide similar commitments to new entrants in the markets for ferrosilicon and silicon carbide.

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The decision is the second merger prohibition of the Commission to be overturned by the Tribunal this year. In the merger between Sunset Bay and Jobling Investments, the Tribunal also found that the proposed supply conditions adequately addressed the competition concerns raised by the merger. The conditions require the merged entity to continue to make products available to existing and new independent stockists for a period of three years.

Most recently, the Tribunal approved the merger between Life Healthcare Group and Joint Medical Holdings, which the Commission had recommended be prohibited due to concerns that it would lead to dominance in the Durban area. Although the Tribunal has not yet issued reasons, it is likely that it considered the fact that Life Healthcare already effectively controlled JMC (particularly in regard to pricing) before acquiring ownership. The legitimacy of this relationship is still being investigated by the Commission in separate proceedings.

Finally, the Tribunal's decision in the merger between Senmin International and Cellulose Derivatives is also expected shortly. The decision is also a reconsideration application of the Commission's prohibition of the merger in February this year.

PUBLISHING AND PRINTING MERGER GOES AHEAD – WITH A RAFT OF CONDITIONS

Media24 (with Paarl Coldset) has been allowed to take over the Natal Witness, subject to a flotilla of conditions aimed at ensuring that Media24 is not able to exclude small community newspaper publishers from accessing printing capacity.

The theory of harm was predicated on the notion that Media24's control of Natal Witness, a large publishing house, may skew Media24's competitive incentives towards the larger publishing business at the expense of its smaller printing business. This may lead it to discriminate in favour of Natal Witness when it came to printing, thus making it difficult for smaller publishers to remain competitive. This concern related to competition, but also to the plight of small businesses, a public interest factor close to the regulator's heart.

The focus on small businesses is perhaps an attempt to exclude Caxton from the remedies. Caxton intervened in the merger (and not for the first time in media mergers) but did not escape unscathed as it is implicated in veiled allegations of market division and coordination, which the Tribunal saw fit to mention but not explore fully.

The Tribunal imposed the following conditions:

- An investment in Media24's printing business to maintain its current printing capacity and the installation of additional printing capacity at Natal Witness.
- Access by small, independent publishers to printing services at certain maximum prices and other conditions of supply.
- The separate governance of the merged entity's community newspaper publishing and printing businesses in the relevant geographic areas so that strategic decisions on the publishing side do not drive the printing decisions.
- The future notification by Media24 of all 'small' mergers relating to community newspaper publishing and printing in the relevant geographic areas.
- Continued support by the merged entity of the Media Development and Diversity Agency (MDDA) that provides non-financial and limited financial support to small community newspaper publishers.

The conditions imposed are certainly among the most onerous imposed on merging parties and will clearly impact Media24's strategy for some time to come, indicating that the Tribunal will not be shy in future to impose conditions that meaningfully restrict the conduct of the post-merger business.

OCEANA CATCHES ASSETS IN FISHING AND COLD STORAGE INDUSTRIES

Two separate merger transactions involving the Oceana Group were conditionally approved by the Commission.

In the first transaction, Oceana, through its subsidiary Commercial Cold Storage (CCS), will acquire V&A Cold Store (V&A). CCS owns and manages warehouse facilities in the main industrial centres and harbours of South Africa, while V&A provides handling and cold storage services and is situated at the Cape Town quayside. The Commission found that the merger will result in Oceana becoming the dominant player in the cold storage market for loose fish and fish destined for export; at the same time Oceana competes with other fishing enterprises that also need access to cold storage. To address this, the Commission imposed two conditions on the merger. The first condition requires Oceana to provide fishing customers access to its cold storage facilities on a non-discriminatory basis. The second requires that Oceana not differentiate in its pricing to its subsidiaries and third parties.

The second transaction involves Oceana's acquisition of a number of assets including fishing vessels and fishing rights for horse mackerel, hake, sole and south coast rock lobster from Bato Star Fishing, Phambili Fishing and a number of entities within African Marine Products. The Commission found that the proposed transaction is unlikely to result in anti-competitive effects provided the third parties that have catching arrangements with the target firms will continue to have access to fishing vessels. The Commission was however concerned about the future of seasonal and short-term contract employees and therefore imposed an employment condition requiring that no retrenchments be made for a period of two years.

Notably, the Commission shares concurrent jurisdiction with the Department of Agriculture, Forestry and Fisheries (DAFF) and has confirmed that any transactions not approved by the DAFF will become divisible from the main transaction.

The Commission's careful consideration of the above mergers was no doubt spurred by the fact that they take place in a market where Oceana has also been the subject of a recent consent order in terms of which it settled accusations of market division between Oceana and Sea Harvest. Oceana and Sea Harvest have certain shareholders in common, adding to perceptions of possible collusion.

MAJOR SUPERMARKET CHAINS' EXCLUSIVITY CLAUSES RAISE CONCERNS

For some time, the Commission has been investigating whether supermarkets' exclusivity clauses in respect of their lease agreements with shopping centres are anticompetitive. In the meanwhile, a series of mergers involving acquisitions of a number of shopping centers has raised similar concerns.

In acquiring these rental businesses, the Synergy Income Fund inherited lease agreements in terms of which anchor tenants (typically large retail chains) are protected from having competing businesses acquire space in the same centre. In the most recent of these mergers, the acquisition of the King Senzangakhona Shopping Centre was approved by the Tribunal subject to the condition that the merging parties negotiate "in good faith" with the Spar Group to have an exclusivity clause removed at the time of the renewal of the lease agreement in respect of the King Senzangakhona Shopping Centre. The lease comes up for renewal in 2018 and the merging parties have 30 days after entering into the new lease to report the negotiation outcomes to the Commission.

The Commission found that the industry practice of property developers entering into anchor tenant arrangements with major supermarket chains for lengthy periods of time functions as a barrier to entry and is designed to exclude competitors or alternatively has the effect of excluding entry by competing retailers.

The Commission found further that the growth of the small independent retailers is hampered by such practices. According to the Commission, by gaining exclusivity in shopping malls, the major supermarket chains foreclose small independent retailers and specialist part-line stores such as bakeries, butcheries and take-away food outlets.

The Tribunal agreed with the Commission's view and found the condition to be an appropriate remedy to address the concern raised by the exclusivity clause. A similar approach was taken in previous mergers earlier in the year. It is interesting to note that the condition does not bind Spar (which is not a party to the merger) and it remains to be seen how far such "good faith" negotiations progress.

TRIBUNAL LOOKS TO EXECUTIVES TO CURE 'CANCER'

The Tribunal's decision in the plastic pipes cartel reinforces the now accepted notion that passive participation in collusive meetings is sufficient to render a firm part of a cartel.

This is in line with the Tribunal's decision in the mesh cartel, which similarly found that "just listening" to competitors' price fixing discussions without actively participating is not a defence. Similarly, failing to implement a price fix following presence at a meeting is not enough to place a firm outside the cartel. It is clear from these decisions that where a meeting at which competitors are present turns to competitively significant matters, the only way to avoid being party to a cartel is actively and conspicuously to object to the discussion and remove oneself from the meeting.

In this vein, the Tribunal commended the courage and integrity shown by the managing director of one of the firms alleged to have been part of the plastic pipes cartel, in facing up to an industry dominated by illicit cartel practices.

Michelle Harding of Petzetakis Africa, being uncomfortable with the collusive practices in the plastic pipes industry, invited several cartel members to a meeting to explain that Petzetakis and its subsidiaries would no longer participate in any collusive activities. Harding then took steps within Petzetakis to ensure this outcome. In its decision, the Tribunal praises Harding and notes that "enforcement against cartels requires more Hardings who are willing to take a moral stand and, as she put it in her testimony, 'stop the cancer'".

The actions of Harding were factored in by the Tribunal in mitigation of Petzetakis' penalty. According to the Tribunal, Harding's actions effectively destabilised the cartel, as without a key player like Petzetakis as a party to the conspiracy the cartel failed. The Tribunal reasoned that bringing cartel activity to an end is the most important of mitigation factors and that Harding's actions in declaring Petzetakis' non-adherence with the collusive arrangements did more to end the collusion than the actions of the leniency applicant. The Tribunal accordingly reduced Petzetakis' administrative penalty by 80%, squashing the penalty from R49,600,000 to R9,920,000.

MILLING COMPANY STAYS ON THE HOOK DESPITE APPEAL TO CAC

The Competition Appeal Court (CAC) has rejected Paramount Mills' most recent bid to have the referral against it in the maize milling cartel prosecution dismissed.

Paramount sought to have the case against it dismissed on two separate grounds. The first was that the complaint was time barred, as the only facts alleged by the Commission in its referral that implicated Paramount took place more than three years before the complaint against Paramount was initiated. The CAC rejected this contention on the basis that Paramount needed to show that it had not persisted in any conduct post 2007, which is contrary to the Commission's allegations. This approach brings into relief the notion that a cartel continues in force throughout its implementation, and does not start and end with an agreement being struck.

The second ground raised by Paramount was that the Commission's referral lacked sufficient detail to render the referral intelligible to Paramount. This contention was also rejected by the CAC (as the Tribunal had done before it). Notably, the CAC reinforced the principle, laid out by the Constitutional Court in the Senwes case earlier in the year, that Tribunal proceedings are *sui generis* in that its inquisitorial powers allow for facts to be presented and interrogated outside of the strictures of pleadings.

Although Paramount may yet be proved right on both counts once evidence is led and challenged, it seems that it will have its day in court along with the other respondent millers.

OUR ANNUAL COMPETITION UPDATE SEMINAR WILL BE HELD AT OUR OFFICES ON THE MORNING OF THURSDAY 13 SEPTEMBER 2012. ADVOCATE JEREMY GAUNTLETT SC WILL BE APPEARING AS OUR GUEST KEYNOTE SPEAKER. PLEASE DIARISE THIS DATE. FOR FURTHER DETAILS PLEASE CONTACT LOUISE SCHNETLER ON jhbevents@dlacdh.com.

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